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JOSU ENGINEERING CONSTRUCTION SDN BHD v. TSR BINA SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MOHD ZAWAWI SALLEH JCA
B IDRUS HARUN JCA
[CIVIL APPEAL NO: N-02(IM)-1111-06-2014]
1 OCTOBER 2015

C ***CIVIL PROCEDURE:*** *Interim payment – Principles – Rules of Court 2012, O. 22A – Judgment on liability awarded in favour of appellant – Whether application for interim payment premature – Whether applicant suffered hardship – Whether applicant would obtain judgment for substantial damages in respect of performance bond money within meaning of O. 22A r. 3(1)(c) & 4(c) of Rules of Court 2012*

D The appellant commenced an action against the respondent for breach of contract, which was allowed by the High Court. Judgment on liability was entered in favour of the appellant and an application for assessment of damages was filed. The appellant subsequently filed an application under O. 22A of the Rules of Court 2012 ('RC 2012') for an order for interim payment. The High Court, however, dismissed the appellant's application. E Hence, this appeal. The issues that arose were (i) whether the appellant's application for interim payment was pre-mature; and (ii) whether the circumstances of this instant appeal did not warrant an order for interim payment to be made.

F **Held (allowing appeal in part)**
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) There are strong policy grounds for the courts to order interim payments in an appropriate case. It is in the interests of the administration of justice and of plaintiffs in particular, that defendants be encouraged to G make early voluntary interim payments so as to alleviate financial hardship on the part of the plaintiffs. In this instant appeal, there was no need for the court to consider any question of potential liability as it was simply not an issue. The judgment on liability had been awarded in favour of the appellant and what was left to be assessed were the quantum/amounts of damages of the appellant's claim. The application H for interim payment by the appellant was thus not pre-mature. (paras 22, 23 & 25)

(2) The object of an application for an interim payment is to alleviate hardship or prejudice to the plaintiff during the period from the institution of the proceedings up to the date of trial. However, in this I case, the assessment of damages could not be proceeded expeditiously

due to two applications for discovery of documents filed by the respondent. This had caused hardship to the appellant. Thus, the appellant had shown hardship in the circumstances. (paras 31 & 33)

(3) On an application for an interim payment, the court is primarily focused on ensuring that the plaintiff is not kept out of the damages to which he or she is entitled, without incurring a real risk of over-compensating a plaintiff or prejudging matters that are properly within the province of the trial judge. The appellant herein had proved that if the action proceeded to trial (or for assessment of damages) the appellant would obtain judgment for substantial damages against the respondent in respect of the performance bond money within the meaning of O. 22A rr. 3(1)(c) and 4(c) of the RC 2012. (paras 37 & 38)

(4) There was ample evidence to show that the appellant provided performance bond of RM641,684.85 to the respondent pursuant to the sub-contract. Thus, the interim payment should be made forthwith by the respondent to the appellant for the said performance bond money. This court however rejected awarding interest on the amount of the performance bond money. This court also reserved the assessment of damages in respect of other items claimed by the appellant as inquiries were needed in respect of these items. Interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise. This court was not confident to make out a correct figure the amount that the appellant would be entitled in respect of these items. (paras 39, 40 & 43)

Bahasa Malaysia *Headnotes*

Perayu memulakan tindakan terhadap responden bagi kemungkiran kontrak yang dibenarkan oleh Mahkamah Tinggi. Penghakiman berkenaan liabiliti yang dimasuki memihak kepada perayu dan permohonan untuk pentaksiran ganti rugi difailkan. Perayu berikutnya memfailkan permohonan di bawah A. 22A Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') bagi satu perintah bayaran interim. Mahkamah Tinggi walau bagaimanapun menolak permohonan perayu. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan adalah: (i) sama ada permohonan perayu bagi bayaran interim adalah pra-matang dan (ii) sama ada hal keadaan rayuan ini tidak mewajarkan perintah untuk bayaran interim dibuat.

Diputuskan (membenarkan sebahagian rayuan perayu)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Terdapat alasan polisi kukuh untuk mahkamah memerintahkan bayaran interim dalam kes yang bersesuaian. Ia adalah kepentingan pentadbiran keadilan dan plaintif-plaintif khususnya bahawa defendan-defendan digalakkan untuk membuat bayaran interim awal secara sukarela supaya

dapat meringankan kesusahan kewangan pihak plaintif-plaintif. Dalam rayuan ini, tiada keperluan untuk mahkamah mempertimbangkan sebarang persoalan tentang potensi liabiliti kerana ia bukan suatu isu. Penghakiman terhadap liabiliti diawardkan memihak kepada perayu dan apa yang tinggal untuk ditaksir adalah kuantum/amaun ganti rugi tuntutan perayu. Permohonan bagi bayaran interim oleh perayu adalah dengan itu tidak pra-matang.

(2) Tujuan permohonan bagi bayaran interim adalah untuk meringankan kesusahan atau kemudaratan kepada plaintif sepanjang tempoh dari permulaan prosiding sehingga tarikh perbicaraan. Walau bagaimanapun, dalam kes ini, pentaksiran ganti rugi tidak boleh diteruskan dengan segera kerana dua permohonan untuk penzahiran dokumen difailkan oleh responden. Ini menyebabkan kesusahan kepada perayu. Maka, perayu telah menunjukkan kesukaran dalam keadaan tersebut.

(3) Dalam pemohonan untuk bayaran interim, mahkamah tertumpu terutamanya dalam memastikan bahawa plaintif tidak diketepikan daripada ganti rugi yang mana dia berhak, tanpa menanggung risiko memberi pampasan berlebihan kepada plaintif atau menyentuhi perkara-perkara tertakluk kepada bidang kuasa hakim bicara. Perayu di sini membuktikan bahawa sekiranya tindakan diteruskan dengan perbicaraan (atau untuk pentaksiran ganti rugi) perayu akan mendapat penghakiman bagi ganti rugi besar terhadap responden berkenaan dengan wang bon pelaksanaan dalam maksud A. 22A k. 3(1)(c) dan 4(c) KKM 2012.

(4) Terdapat banyak bukti yang menunjukkan bahawa perayu memperuntukkan bon pelaksanaan sebanyak RM641,684.85 kepada responden menurut sub-kontrak. Maka, bayaran interim harus dibuat serta merta oleh responden kepada perayu bagi wang bon pelaksanaan tersebut. Mahkamah ini walau bagaimanapun menolak pemberian faedah ke atas amaun wang bon pelaksanaan. Mahkamah ini turut mengekalkan pentaksiran ganti rugi berkaitan item-item lain yang dituntut oleh perayu kerana siasatan diperlukan berkenaan dengan item-item ini. Prosedur bayaran interim tidak sesuai di mana isu fakta adalah rumit atau di mana persoalan undang-undang yang sukar berbangkit. Mahkamah ini tidak yakin untuk memberi jumlah amaun tepat yang perayu berhak berkenaan dengan item-item ini.

Case(s) referred to:

British and Commonwealth Holdings PLC v. Quadrex Holdings Inc [1989] 3 All ER 492 ***(refd)***

David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Anor [2005] 1 CLJ 589 CA ***(refd)***

Gibbons v. Wall (Unreported) ***(refd)***

Loy Teck Chye v. Antah Sedgwick Chartered Insurance Brokers Sdn Bhd [2009] 1 LNS 648 HC ***(refd)***

Ricci Burns Ltd v. Toole [1989] 1 WLR 993 ***(refd)***

Schott Kem Ltd v. Bentkey [1990] 3 All ER 850 ***(refd)***

Shearson Lehman Inc v. Maclaine, Watson Ltd, [1987] 1 WCR 480 ***(refd)***

Stringman (A Minor) v. McArdle [1994] 1 WLR 1653 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 41(1)
Rules of Court 2012, O. 22A rr. 3(1)(b), (c), 4(c)

Rules of the Supreme Court [UK], O. 29 rr. 11, 12

Other source(s) referred to:
Blackstone's Civil Practice, 2008, pp 454, 455, paras 36.9, 36.13

For the appellant - GH Tee; M/s GH Tee & Co
For the respondent - Romesh Abraham (Lam Ko Luen & Yvonne Chan with him); M/s Shook Lin & Bok

[Appeal from High Court, Seremban; Writ Summons No: MT1-22-2-2004 (overruled in part)]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] The appeal arose out of the Seremban High Court's decision dated 23 May 2014 dismissing the appellant's application for interim payment under O. 22A of the Rules of Court 2012 ("RC 2012").

[2] There are no written grounds of judgment of the High Court. We do not, therefore, have the benefit of the High Court's reasoning for dismissing the application.

Facts Of The Case

[3] The facts giving rise to this appeal may be summarised as follows:

(a) On 5 January 2014, the appellant commenced an action against the respondent for breach of contract. The respondent in turn filed its defence and counterclaim against the appellant also for breach of contract.

(b) On 6 February 2007, the High Court allowed the appellant's application to strike out the respondent's defence and counterclaim pursuant to O. 34 of the Rules of the High Court 1980 and entered judgment on liability in favour of the appellant.

(c) On 2 March 2007, the respondent filed an appeal to the Court of Appeal against the decision of the High Court dated 6 February 2007 (the first appeal).

(d) On 4 April 2007, the respondent filed an application to set aside the judgment dated 6 February 2007 and to reinstate the defence and counterclaim. Following thereto, the respondent withdrew the first appeal.

A (e) On 3 February 2008, the respondent's application was dismissed by the High Court on the ground that the proper cause of action should have been by way of appeal to the Court of Appeal.

(f) On 4 February 2009, the respondent filed an appeal to the Court of Appeal against the decision dated 3 February 2009 (the second appeal).

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(g) On 16 August 2011, the second appeal was dismissed by the Court of Appeal.

(h) The respondent then applied for leave to appeal to the Federal Court. The leave application was dismissed on 14 February 2012.

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(i) On 30 August 2012, the appellant filed an application for assessment of damages; and

(j) On 28 May 2013, the appellant filed an application under O. 22A of the RC 2012 for an order for interim payment. As stated earlier, the High Court dismissed the appellant's application. Hence, this appeal.

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The Appeal

[4] The appellant assailed the impugned decision on various grounds. However, we find that the appeal can be disposed of on the following two key issues:

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(a) whether the appellant's application for interim payment is pre-mature; and

(b) whether the circumstances of this instant appeal do not warrant an order for the interim payment to be made.

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[5] Learned counsel for the respondent submitted that the appellant's application for an interim payment is pre-mature. In support of his submission, reliance was placed on the decision of the High Court in *Loy Teck Chye v. Antah Sedgwick Chartered Insurance Brokers Sdn Bhd* [2009] 1 LNS 648, where Mohamed Apandi Ali J (as he then was) said:

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> Since the Plaintiff has already filed an application for assessment of damages *vide* Enclosure 59, the Plaintiff's application for an interim payment is pre-mature and should be refused. If is only upon assessment that the Court can determine what sum that can properly be said to be due to the appellant.

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[6] With respect, on the factual matrix of this instant appeal, we are unable to agree with the submission.

[7] At the outset, it is important to have the term "interim payment" clearly defined. "Interim payment" is payment paid to a plaintiff on account of final damages, that is before the assessment of damages has been completed. They are paid primarily to overcome financial difficulties which a plaintiff might experience pending final assessment (See NSW Law Reform Commission, Report 78 [1986] – Provisional Damage).

I

Issue (a)

Legal Principles on Interim Payment

[8] An interim payment of damages can be made in accordance with O. 22A of the RC 2012, where the court is "satisfied" that "the plaintiff has obtained judgment against the defendant for damages to be assessed" (see r. 3(b)), or "if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant" (see r. 3(c)).

[9] As shown above, r. 3(c) allows interim payment of damages even though liability is still in question.

[10] Courts in England have interpreted the burden placed upon a plaintiff seeking interim payment to be something more than a *prima facie* (at first glance) standard, but something less than the criminal standard.

[11] In *Shearson Lehman Inc v. Maclaine, Watson Ltd,* [1987] 1 WLR 480, Lloyd LJ explained at p. 489:

> Something more than a *prima facie* case is clearly required; but not proved beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden. This involves no lasting hardship on the defendant since there is a provision for readjustment at the trial in case of an overpayment.

[12] This decision was followed in *Ricci Burns Ltd v. Toole* [1989] 1 WLR 993:

> The standard of proof on the probabilities is high but is it not necessary to exclude every possibility of failure because the order for interim payment may be reversed at trial.

[13] The following comments of May, LJ in *Gibbons v. Wall*, (12 February 1988), (CA) (unreported) were quoted with approval by Browne-Wilkinson VC in *British and Commonwealth Holdings PLC v. Quadrex Holdings Inc* [1989] 3 All ER 492 at p. 509:

> [T]he civil burden of proof ... is a flexible test ... and it depends upon the nature of that which has to be proved where on the flexible scale of the balance of probabilities one has to pitch the burden ... in the context of an application for an interim payment ... the burden is a high one within that standard if only because litigation of its nature involves no certainties. A plaintiff with what may appear on paper to be a strong case may find it fail at trial. If he does then he will have to repay the whole or to the extent that he fails, part of the interim payment. But ... the plaintiff may spend it ... If he does it may be difficult ... to recover if he fails ultimately at trial. Clearly the burden resting upon an applicant in those circumstances is towards the top of the flexible scale.

[14] In *David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Anor* [2005] 1 CLJ 589; [2005] 2 AMR 173, our Malaysian Court of Appeal held that:

(a) the standard of proof required in an application for interim payment is on the balance of probabilities (para. 11);

(b) underlying purpose of O. 22A is to provide for an interim payment to alleviate a plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial: see para. 12; and

(c) there is no necessity for the plaintiff to show that he would suffer prejudice if he did not obtain an interim payment; neither must he show that a particular sum is required to cover a need. In awarding an interim payment, the court is not concerned with how the money is to be spent.

[15] Discussing the current English rules, (which are in *pari materia* with those contained in the Malaysian O. 22A of RC 2012), this is how the required standard of proof is treated in *Blackstone's Civil Practice*, 2008 (at p. 454, para. 36.9):

> On an application under CPR, r. 25.7(1)(c), (d), the court has to be satisfied on the balance of probabilities that the claimant 'would' obtain judgment. This wording is identical to that used in the old rules (RSC, O. 29, rr. 11(1)(c) and 12(1)(c)), and it ought to be the case, despite the new approach to interpretation, that the same principles will apply regarding the standard of proof on these two grounds. If so, *it has to be shown that the claimant will win on the balance of probabilities, but at the upper end of the scale, the burden being a high one. Being likely to succeed at trial is not enough*. (emphasis added)

[16] In *Civil Procedure* (2nd edn) by Paula Loughlin and Stephen Gerlis, the authors' view of the position is stated thus:

> An interim payment may be made ... where the claimant has **a very strong claim** against the defendant.
>
> They are regularly made ... **where liability is often easily established**. (emphasis added)

[17] Paragraph 36.13 of *Blackstone's Civil Practice*, 2008 (p. 455), is also quite instructive: it likens applications for interim payment to applications for summary judgment. The paragraph reads as follows:

> It is quite common to combine applications for summary judgment with applications for interim payments. Summary judgment is available where the defence has no real prospect of success, and interim payments are available where the claimant can show that liability will be established. Obviously these are similar concepts.

[18] Order 22A of the RC 2012 does not restrict interim payment of damages to any type of action. In England, where the approach is to identify particular types of claim in which an interim payment may be made, the rules essentially cover every type of action.

(See England & Wales, Rules of the Supreme Court, O. 29, rr. 11 & 12).

[19] The English Court of Appeal in *Schott Kem Ltd v. Bentkey* [1990] 3 All ER 850 held at p. 858 that there is "no basis for any further limitation on the jurisdiction of the court to order interim payments than those set out in O. 29 itself".

[20] Where the judgment was entered in favour of the appellant/plaintiff and for damages to be assessed, it was held by English Court of Appeal to be a proper case for ordering interim payment (see *Stringman (A Minor) v. McArdle* [1994] 1 WLR 1653).

[21] Thus, in our view, interim payments can be ordered in actions other than personal injury cases such as proceedings for contractual claims, actions for wrongful death, product liability actions, wrongful dismissal claims, trespass to land, misappropriation of funds, and actions for property damaged.

[22] There are strong policy grounds for the courts to order interim payments in an appropriate case. It is in the interests of the administration of justice and of plaintiffs in particular, that defendants be encouraged to make early voluntary interim payments so as to alleviate financial hardship on the part of the plaintiffs.

[23] In this instant appeal, there is no need for the court to consider any question of potential liability as it is simply not an issue. The judgment on liability has been awarded in favour of the appellant pursuant to the High Court order dated 6 February 2007. What are left to be assessed are the quantum/amounts of damages of the appellant's claim in paras. 9.1(a) to 9.1(l)(iii) of the statement of claims.

[24] In *David Chelliah* (*supra*), the appellant had obtained judgment against the respondent for damages to be assessed, yet the Malaysian Court of Appeal held that it was a proper case for ordering interim payment. Similarly, there was no judgment on liability entered in the cases of *Schott Kern and Shearson Lehman* (*supra*), but the courts ordered interim payment in those cases.

[25] In the circumstances, in this instant appeal, the application for interim payment by the appellant is not pre-mature.

Issue (b)

[26] Learned counsel for the appellant submitted that the circumstances of this instant appeal did not warrant an order for interim payment to be made on the following grounds:

(a) The appellant had failed to discharge the burden of proof that the loss alleged to have been suffered was caused by the respondent's breach;

(b) There is no urgency; and

(c) The appellant did not suffer any hardship.

[27] Concerning ground (a), learned counsel for the respondent submitted that the appellant would not be able to discharge its burden of proof of showing "causation" ie, that its loss arose from the breach at the assessment proceedings.

[28] Concerning ground (b), learned counsel for the respondent posited that the appellant had only filed the notice of assessment on 30 August 2012, ie, five years after date of the judgment. The application for interim payment was filed on 28 May 2013, ie, nine months later. Therefore, there is no urgency for the appellant to pursue claim for damages against the respondent.

[29] Lastly, learned counsel for the respondent argued that the appellant had also failed to show that an order for interim payment is necessary to alleviate hardship to the appellant pending the disposal of the assessment proceedings. The winding up petition had been withdrawn. CIMB Bank had indicated that they would unfreeze the appellant's account if the event of default, ie, the winding up petition was withdrawn.

[30] We will deal with grounds (b) and (c) first. They are related grounds.

[31] As we have alluded to in para. 22, the object of an application for an interim payment is to alleviate hardship or prejudice to the plaintiff during the period from the institution of the proceedings up to the date of trial. By virtue of the High Court order dated 6 February 2007, the appellant is entitled to recover the claims stated in paras. 9.1(a) to 9.1(l) (iii) of the statement of claim at amounts to be assessed by the Registrar. However, the assessment of damages could not be proceeded expeditiously due to two applications for discovery of documents filed by the respondent. This has caused hardship to the appellant especially where the amounts and monies due haven been withheld since 2002 ie, more than ten years ago.

[32] Further, hardship was further caused to the appellant when the respondent filed the petition for winding up against the appellant in respect of the Port Dickson's case. The appellant has been compelled by the winding up petition to fork out a further sum of more than RM1 million in order to stands off the winding up petition.

[33] Having said that, we must issue a caveat here. The rule does not require the appellant to demonstrate real hardship in application for interim payment. The plaintiff is not required to demonstrate any particular need beyond the general need to be paid his damages as soon as possible and the court should not, when considering to order such a payment, investigate how the money is to be used. However, in this instant appeal, the appellant has shown hardship in the circumstances.

Ground (a)

[34] In the application for interim payment, the appellant seeks interim payment for items as follows:

Paragraph # of Statement of Claims	Description	Amount (RM)
9.1(a)	Retention money	368,982.45
9.1(b)	Balance value of works done but not yet certified	1,341,954.08
9.1(j)	Principal amount of the performance bond	641,600.85
9.1(k)	Alternative claim of interest at 8 % on the principal amounts of claims as from 19 December 2002 to 19 May 2013;	309,945.25
	i. Interest on retention money	1,127,241.42
	ii. Interest on balance value of works done but not certified	
	iii. Interest on amount of performance bond money	538,944.71
		4,328,668.76

[35] Rule 3 of O. 22A of the RC 2012 provides that the court may order the defendant to make an interim payment of such an amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court is likely to be recovered by the plaintiff.

[36] The factors to be taken in determining "a reasonable proportion of the damages" are factual based. Some of the relevant factors are as follows:

(a) The court has to consider what is the likely the damages to be awarded at trial;

(b) The court should also have to keep in mind the danger of overpayment and the possible hardship to the defendant;

(c) The court should not be influenced by how the applicant is proposing to use the payment

(d) The court needs to take into account any existing counterclaim or contributory negligence claim;

A (e) The court needs to consider whether the applicant wants to use the money in a way intended to prejudice any subsequent issue in the trial;

(f) The court needs to consider the respondent's resources or lack of such resources; and

B (g) The court needs to consider the strength of the evidence in each case.

[37] Thus, on an application for an interim payment, the court is primarily focused on ensuring that the plaintiff is not kept out of the damages to which he or she is entitled, without incurring a real risk of over-compensating a plaintiff or prejudging matters that are properly within the province of the C trial judge.

[38] In this instant appeal, we have scrutinised the material on the appeal records, and we are satisfied that the appellant had proved that if the action proceeded to trial (or for assessment of damages), the appellant would obtain judgment for substantial damages against the respondent in respect of the D performance bond money within the meaning of O. 22A rr. 3(I)(c) and 4(c) of the RC 2012.

[39] There is ample evidence to show that the appellant provided performance bond of RM641,684.85 to the respondent pursuant to the subcontract. Contemporaneous document evidence also shows that on or E about 21 January 2003, Bumiputra Commerce Bank paid the performance bond money of RM641,684.85 to the respondent as clearly evidenced by the bank's letter dated 21 January 2003 and acknowledged by the respondent.

[40] We, therefore, ordered that the an interim payment should be made F forthwith by the respondent to the appellant for the performance bond money in the sum of RM641,684.85. We rejected awarding interest on the amount of the performance bond money.

[41] We reserved the assessment of damages in respect of other items claimed by the appellant. Further, inquiries are needed in respect of these G items. The damages in respect of these items should be assessed by the Registrar.

[42] We take the position that interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve. H (see *Schoot Kem Ltd* (*supra*) at p. 73).

[43] The court is not confident to make out a correct figure the amount that the appellant would be entitled in respect of these items.

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Conclusion

[44] In the result, the appellant's appeal is allowed in part. The orders of the court are as follows:

(i) the application for an interim order by the appellant in respect of the performance bond money in the amount of RM641,684.85 is granted in terms as prayed in para. (i) of encl. 10, as varied by this court;

(ii) the interest on the amount of performance bond money is refused;

(iii) the said interim payment should be paid to the appellant and not to be paid into court;

(iv) damages pertaining to other items claimed by the appellant deferred and to be assessed by the Registrar of the High Court Seremban;

(v) costs of RM5,000 here and below to be paid to the appellant; and

(vi) deposit to be refunded.

[45] This judgment is prepared pursuant to s. 41(1) of the Courts of Judicature Act 1964 as our learned brother Mohd Ariff Md Yusof JCA has since retired.